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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

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Questions Presented.

The Court of Appeals has held a dominant newspaper liable under the federal antitrust laws for implementing an advertising acceptability policy found by the District Court to have been formulated and adopted in the good faith exercise of the publisher's editorial judgment and for reasons unrelated to competition. The questions presented are:

1. Whether a newspaper is protected by the First Amendment in refusing to publish advertising which reason tells it should not be published.

2. Whether a newspaper is required by the Sherman Act to publish advertising believed in good faith to be unacceptable and to jeopardize the integrity of the newspaper's advertising section.

3. Whether the clearly erroneous standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure was violated by the appellate court's *de novo* review of the trial court's findings of reasonableness.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

The Petitioner, Providence Journal Company,* respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 18, 1982.

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* Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioner states that the non-wholly-owned subsidiaries of the Providence Journal Company are: Copley/Colony, Inc., Colony/Harbor Cablevision, Inc., Colony Microband of Massachusetts, Inc., Colony Microband of Rhode Island, Inc., Dynamic Cablevision of Florida, Inc., Greater Fall River Cable TV, Inc., Mass. Cablevision, Inc., Metro Cablevision Corp., Mobile-Pensacola Broadcasters, Inc., Network Publishing Co., Inc., Torrance Community Cablevision, Inc., Vision Cable Company of Rhode Island, Inc., and Whaling City Cable TV, Inc. Biltmore Associates is a non-subsidiary affiliate of Providence Journal Company.

Opinions Below.

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at __ F.2d __. The opinion of the District Court (reprinted in the Appendix at A. 14) has not been officially reported. In addition, the Appendix includes opinions rendered by those courts in related litigation—the unreported District Court opinion denying a preliminary injunction (reprinted in the Appendix at A. 20), the opinion of the Court of Appeals affirming the same (reprinted in the Appendix at A. 25) reported at 493 F.2d 82, the District Court opinion on the merits (reprinted in the Appendix at A. 36) reported at 471 F. Supp. 416, and the opinion of the Court of Appeals affirming the same (reprinted in the Appendix at A. 54) reported at 621 F.2d 441.

Jurisdiction.

The Judgment of the Court of Appeals for the First Circuit was entered on June 18, 1982. On July 9, 1982, the Court of Appeals entered an order staying the issuance of its mandate pending filing of this Petition by August 9, 1982. This Petition was filed within the time prescribed by the aforesaid order, and within 90 days of entry of judgment. 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

Article I of the Amendments to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

United States Code, Title 15:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

Fed. Rules Civ. Proc. 52(a):

In all actions tried upon the facts without a jury ... [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Statement of the Case.

Petitioner seeks a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the First Circuit which reversed the judgment rendered in Petitioner's favor by the United States District Court for the District of Rhode Island following a bench trial. To facilitate an understanding of the important issues implicated in this case, Petitioner will summarize the underlying facts and judicial proceedings in related litigation instituted against Petitioner by similar, albeit unaffiliated, business operations.

A. The Parties.

Petitioner Providence Journal Company (hereinafter "Journal") is a Rhode Island corporation headquartered in the City of Providence in that State. The Journal publishes daily newspapers in Rhode Island and adjacent southeastern Massachusetts. While the Journal publishes the only metropolitan daily newspapers of general circulation throughout the State, other daily and weekly newspapers and "shoppers" are published and circulated in localized areas within the larger geographic market served by the Journal.

In 1972, one Keith Walker d/b/a Homefinders (hereinafter "Walker") commenced a so-called rental referral business in Providence, Rhode Island, as a franchisee of Homefinders of America (hereinafter "Homefinders"), a Colorado corporation. Rental referral firms, which, after extracting an advance fee, provide customers with a one year "policy" entitling them to access to lists of purportedly available homes and apartment rentals, had sprung up across the country under Homefinders' direction. *See, generally, Rentex, Inc., et al.*, 87 F.T.C. 1340 (1976). Walker and Homefinders were parties to related litigation against the Journal, but were not parties below.

Respondent Home Placement Service, Inc. (hereinafter "Home Placement") is a Rhode Island corporation which entered the rental referral business in Providence in late March, 1973. It was organized by respondent Joseph P. Muschiano and others saw the opportunity "for another business to jump in and grad [sic] (grab) this [business]." Home Placement was only in operation as a rental referral firm for approximately two weeks.

B. The Underlying Controversy.

The Journal adopted a policy in early 1973 of refusing to accept advertising placed by rental referral agencies which charged a fee to obtain information pertaining to purported vacancies. That policy resulted from the Journal's experience with Walker, beginning in August, 1972, when Walker commenced placing classified advertising listing specifically described properties ostensibly for rent under columns headed "Houses for Rent," "Suburban Rentals," "Furnished Apartments," or "Unfurnished Apartments." The advertisements placed by Walker, while indistinguishable in format from those placed by landlords, were designed to attract an unusually high degree of attention by indicating, for example, that children and pets were acceptable, that utilities were paid, or that parking was available; the advertisements were sufficiently opaque in describing the property as to defy any effort by the reader to contact the ostensible landlord directly.[1] Interested prospects who responded by telephone to

[1] Walker placed as many as ten such advertisements in each edition of the newspapers published by the Journal. Representative copy in the record reads as follows:

"PROVIDENCE: Rent this darling 2 bedroom, just $125 a month. Kids O.K. Good area. 785-1112, HOMEFINDERS."

"RIVERSIDE: Large and lovely 2 bedroom, just $125 per month, major appliances. Won't last. 785-1112, HOMEFINDERS."

Walker's advertisements were not given information concerning the properties advertised when they called, but were advised to "stop by the office and register."

A mere visit to Walker's office did not, however, suffice to connect the prospect with the advertised properties. Payment of a twenty-dollar fee was required for access to information sufficient to enable the prospect to contact the landlord. Many times, the specific property which had enticed the customer was "unavailable" either because it was no longer vacant or, indeed, had never existed. Walker on occasion advertised fictitious properties to attract unsuspecting customers.

Almost immediately after Walker's classified advertising began to appear, the Journal started to receive reader complaints. Those who had responded to Walker's advertisements complained of being surprised and confused about being required to pay a fee for access to specific properties advertised in the newspapers. Other Journal readers complained of getting little or no satisfactory rental information for fees which they had paid. Certain landlords also complained that Walker had listed their properties without their permission.

In mid-September, the Journal advised Walker that it would no longer accept his advertisements. Walker thereafter agreed to include disclosure of his fee in the advertising, and the Journal resumed publication of his advertisements. The complaints, however, did not abate; indeed, their volume was so great that the Journal specially assigned one of its employees to monitor all such complaints. At about the same time, the Journal was contacted by several consumer protec-

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"WARWICK: Beautiful setting for this 4 room, $160. Child O.K. Hurry. 785-1112. HOMEFINDERS."

"BARRINGTON: Utilities paid. Quaint 1 bedroom cottage. $20 per week. Stove and refrigerator, parking. 785-1112, HOMEFINDERS."

tion agencies which had received similar complaints.[2] By January 31, 1973, the Journal concluded that it would no longer accept advertisements placed by Walker, and, because of its experience and concern about the potential deception of its readers, implemented a policy against accepting advertising from any rental referral firm which charged prospective tenants a fee for access to rental listings. Walker was informed of the Journal's decision by letter dated February 1, 1973. About three months later, Walker closed his doors and left the state.

The Journal implemented the above-described policy to maintain a quality advertising section for its readers. After receiving complaints concerning Walker's practices and recognizing the obvious potential for abuse by similar firms, the Journal wished to disassociate itself from businesses of this type.[3]

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[2] The Rhode Island Consumer's Council and the Better Business Bureau also received numerous complaints about Walker. These agencies contacted the Journal to inquire if the Journal was aware of the problems which consumers were having with this type of business and the advertising of it.

[3] The reason for this policy was well described by Charles P. O'Donnell, Journal Senior Vice President, as follows:

> "One of the reasons was our concern about the reaction of our readers to what would be taking place. It's essential to the economic health of our business that our readers have trust and confidence in the things that we print. Obviously, in the news end of it, it's essential—I don't mean to infer that we are always perfect with it, but we make a very real effort to see that we give as accurate information as possible to our readers. There is a whole professional aspect to the gathering of the news reporting presented properly. Those same principles of honesty and objectivity apply equally well to our advertising. We were very concerned about the numerous complaints we had received about advertising in this field, and we wanted to communicate to our readers what our policy was."

Respondent Muschiano, who by his own admission "knew quite a bit about and had many dealings with Homefinders" and saw the latter's unfavorable publicity as an opportunity "for another business to jump in and grad (*sic* grab) this" business, began operation as Home Placement in March of 1973, some six weeks after the Journal had implemented its policy. As described by Home Placement in its brief to the court below:

> "Home Placement generally followed the format for business that had been introduced into Rhode Island by Homefinders—that is, its purpose was to assist prospective tenants to locate residential property by making available to them for a fee, a catalogue of available rentals which were listed with Home Placement by landlords. The service was purchased by the consumers in the form of a contract."

Like Walker, respondents insisted that the fee be paid by prospects in advance; like Walker, respondents placed advertisements in the Journal's classified section purporting to list specific vacancies.[4] Respondents, however, denied listing fictitious properties and denied listing properties without the landlords' consent.

Initially, the Journal accepted Home Placement's classified advertising, being unaware of the nature of respondents' business. However, the Journal learned promptly of the similarity between respondents' operations and those formerly engaged in by Walker. Respondents were advised of the Journal's policy and the fact that their advertising was unacceptable. The Journal received no complaints about Home Placement. For a brief period, respondents ceased charging a fee to prospects, and their advertisements in Journal publications resumed. This was apparently inconsistent with re-

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[4] A typical Home Placement advertisement read as follows: "SLOCUM: New duplexes, two bedrooms, 1½ baths, carpeted, built-in, $250 a month, lease. Home Placement. 828-9020."

spondents' *modus operandi*, and Home Placement ceased doing business as a rental referral firm shortly thereafter.

C. The Proceedings Below.

Walker had filed suit against the Journal, its director of advertising, the consumer protection agencies which had forwarded complaints to the Journal and their directors, and pseudonymously designated customers of Walker and the Journal. Walker claimed that the Journal's refusal to accept his advertising was violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sought treble damages, injunctive relief, and attorneys fees pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Walker's motion for preliminary injunction was heard by District Judge Day in May, 1973, and denied (A. 20); that denial was affirmed on appeal. *Walker v. Providence Journal Co.*, 493 F.2d 82 (1st Cir. 1974) (A. 25).

Prior to trial on the merits, Homefinders was added as a party plaintiff and Walker was dismissed for failure to respond to discovery requests. Following a bench trial, District Judge Boyle entered judgment in defendants' favor, finding that the Journal had discontinued carrying Walker's advertising and had implemented its policy to protect the integrity of its classified advertising section and not for anticompetitive reasons. *Homefinders of America, Inc. v. Providence Journal Co.*, 471 F. Supp. 416, 422-423 (D.R.I. 1979). On appeal the First Circuit affirmed, concluding that the trial court's findings were not clearly erroneous, but were, indeed, "plainly right." *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir. 1980).

Respondents brought suit in 1977, approximately four years after Walker had commenced his litigation against the

Journal. They charged the Journal with the same violations of the antitrust laws as Walker had charged.

Trial commenced in December, 1980. The parties stipulated that the earlier record of the Walker and Homefinders case could be considered for all purposes by Judge Boyle. Respondents also offered brief testimony concerning Home Placement's operations. The trial court found that respondents operated in the same manner as Homefinders, placing advertisements for specific rental properties with a brief and untraceable description, followed by its name and telephone number, then selling a list of available properties for an advance fee. (Slip op. at 3-4, App. A15-A16). While respondents were not affiliated with Homefinders and did not seek to advertise unavailable properties, the District Court found this to be "a distinction in search of a difference." (*Id.* at 8, App. A-18.) The trial court adhered to its earlier findings that the Journal had unilaterally adopted its policy for sound business reasons. Specifically, the court found that:

> "[t]he decision of the Journal not to publish advertisements such as those involved here was not made in a vacuum ... [t]he Journal previously ran similar advertisements which resulted in customer complaints. In *Homefinders*, Plaintiff, a business similar to Home Placement, was refused space in the Journal's classified ad section after the Journal received complaints from its subscribers. The Journal decided this type of advertisement possessed too great a potential for misrepresentation with concomitant exposure to liability and disadvantageous publicity." (*Id.* at 8, App. A18).

The trial court concluded that no antitrust violation had been made out and entered judgment dismissing the action.

Respondents appealed to the Court of Appeals, which reversed the District Court's findings of fact and conclusions of

law, and held that the Journal's policy was unreasonable as a matter of law. The case was remanded for further proceedings on remedial issues only. The Court of Appeals found that the additional evidence offered by respondents established "marked differences" between the respective operations of Walker and respondents, "requiring, as a matter of law, a different result." (Slip op. at 2, App. A2.) The Court of Appeals found dispositive the lack of proof of actual deception by respondent and lack of consumer complaints against them and refused to "accept that the sale of rental information is an inherently and unfailingly deceptive practice or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium." (*Id.* at 5, App. A5.) The Court further concluded that respondents' status as a competitor of the Journal for rental listings was a "special circumstance," overcoming the Journal's "presumptive[] free[dom] to choose its advertising." (*Id.* at 5, App. A5.) The Court accordingly held that Sections 1 and 2 had been violated, concluding, in essence, that the Journal's policy was unreasonable as a matter of law.

Summary of Reasons for Granting the Writ.

The instant case presents intertwined First Amendment and Sherman Act issues of fundamental importance. Never before in the history of the Republic has an appellate court, federal or state, held a publisher liable for refusing, in good faith for reasons unrelated to competition, to publish advertising which the publisher finds to be unsuitable and unacceptable.

The Journal faced with a substantial number of reader complaints concerning the deceptive advertising and the practices of a rental referral agency, had implemented a general

policy whereby it discontinued accepting classified advertisements from any such agency. This good faith policy decision—characterized by the Court of Appeals as "a paternal judgment" (Slip op. at 4, App. A4), but, in fact, at the heart of the journalistic process—was undisputedly grounded on the Journal's editorial and business judgment that its own integrity should not be compromised by association with endeavors which it considered to be of potentially questionable veracity.

This Court has unequivocably held that newspaper publishers are to be given the widest latitude in choosing what they will or will not publish. Moreover, decisions by courts of appeal consistently reserve, even to a dominant firm, reasonable leeway in selecting those with whom it will deal. In striking down the Journal's policy, the Court below departed from those established principles of both constitutional and federal antitrust law.

The District Court found that the Journal adopted the policy at issue "to minimize the chance it would run afoul of the law or harm its reputation. In other words, its refusal was a reasonable business decision." (Slip op. at pp. 7-8, App. A18.) And as the District Court observed, that decision was not "adopted in a vacuum," but followed the Journal's unfavorable experience with a similar operation—an experience which led the Journal to conclude that "this type of advertisement possessed too great a potential for misrepresentation." (*Id.* at 8, App. A18).[5] Implicit in the District Court's opinion is the finding that the Journal's stated reasons were not pre-

[5] The District Court made similar findings following trial of the Homefinders case on the merits:

> "The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy

textual and that the supposed "competition" between the newspaper and rental referral agencies played no part in the adoption of the policy. These findings, consistent with the strictures of Fed. Rules Civ. Proc. 52(a), were not set aside on appeal. Rather, the Court of Appeals refused to "accept that the sale of rental information is an *inherently* and *unfailingly deceptive* practice or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium." (Slip op. at 5, App. A5 emphasis added.)[6] In so doing, the Court of Appeals erroneously placed on the Journal the burden of making the same decision as to content as the Court itself would make and, in effect, insisted that the newspaper treat each advertiser "in a vacuum" without reference to prevailing media practices. The antitrust laws do not foreclose, and the First Amendment protects, a publisher's right to formulate policies concerning the content of his newspaper. Unless deemed pretextual or augmented by other proof of anti-competitive animus—findings not made by the Court below—those policies cannot be the predicate for treble damages or injunctive relief.

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did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising section for its readers. After receiving complaints from readers as to the quality of service Homefinder's was providing, and recognizing the obvious potential for abuse in other such firms, Defendants made a legitimate consumer-oriented decision to stop dealing with fee-charging firms." (471 F. Supp. at 422-423, App. A46-A47.)

In the *Homefinders* appeal, the Court of Appeals held that it "could not label such findings plainly wrong; indeed, they seem plainly right." (621 F.2d at 443, App. A58.)

[6] The Court of Appeals did acknowledge that, if Home Placement "adopt[ed] Homefinders' objectionable practices," the antitrust laws did not bar the Journal from discontinuing its advertising. (Slip op. 4-5, App. A4-A5)

The Court below, while acknowledging the Journal's presumptive freedom to choose its advertising,[7] nonetheless concluded that respondent's alleged status as a competitor of the Journal was a "special circumstance" calling for a different result. (Slip op. at 12, App. A12.) This "special circumstance" is entirely too slender a reed to support the Court's abrupt

[7] The Court's modest citation of a single decision for that proposition seriously understated the weight of authority, both federal and state, upholding a publisher's right to refuse advertising copy in the form or location demanded or to refuse to run such copy at all. *E.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Staff Research Associates, Inc. v. Tribune Co.*, 346 F.2d 372 (7th Cir. 1965); *Allston v. Lewis*, 480 F. Supp. 328 (D.S.C. 1979); *Person v. New York Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Burke v. Kingsport Publishing Corp.*, 377 F. Supp. 221 (E.D. Tenn.), *aff'd mem.*, 497 F.2d 923 (6th Cir. 1974); *Carpets by the Carload, Inc. v. Warren*, 360 F.Supp. 1075 (E.D. Wis. 1973); *America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972); *Resident Participation, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971); *Levinson v. Evening Star Newspaper Co.*, 138 F. Supp. 947 (D.D.C. 1955); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Modla v. Tribune Publishing Co.*, 14 Ariz. App. 82, 480 P.2d 999 (1971); *Approved Personnel, Inc. v. Tribune Co.*, 177 So.2d 704 (Fla. Dist. Ct. App. 1965); *Brewster v. Ashland Publishing Corp.*, 345 F.Supp. 35 (W.D. Wis. 1972); *Schuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *Friedenberg v. Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *Bloss v. Federated Publications, Inc.*, 380 Mich. 485, 157 N.W.2d 241 (1966), *aff'g* 5 Mich. App. 74, 145 N.W.2d 800 (1968); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 B.W.S.2d 515 (Orange Cnty. Sup. Ct. 1954); *Mack v. Costello*, 32 S.D. 511, 143 N.W. 950 (1913); *Newspaper Printing Corp. v. Galbreth*, 580 S.W.2d 777 (Tenn. App.), *cert. denied*, 444 U.S. 870 (1979); *Mid-West Electric Cooperative, Inc. v. West Texas Chamber of Commerce*, 369 S.W.2d 842 (Tex. Civ. App. 1963); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891 (1979).

departure from well-established antitrust and First Amendment jurisprudence. Quite apart from the constitutional question, the antitrust laws do not prohibit even a monopolist from exercising legitimate business judgment; the bare possession of monopoly power does not strip its holder of reasonable leeway in decision making.

Nearly four decades ago this Court acknowledged, but had no need to reach the profound constitutional questions which would be raised by an antitrust decree compelling newspaper proprietors "to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). The Court below, substituting its own notions of suitability for what it characterized as the "paternal judgment" of the Journal to protect its readers from potentially deceptive businesses, imposed just such a decree.

If the decision below is allowed to stand, either private litigants or the executive branch will have the right to use the Sherman Act to convert media outlets into mere "passive receptacle[s] or conduit[s]"—precisely what this Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), held a legislature could not do.

The fundamental error below goes beyond the Court's failure to weigh Petitioner's First Amendment interests in the balance, for those interests expanded the zone of reasonableness which the Sherman Act affords all businesses, media and non-media alike. This Court long ago held that, "in the absence of any purpose to create or maintain a monopoly," the antitrust laws do not bar a private commercial enterprise

> "freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The possessor of monopoly power, moreover, is not stripped of that discretion, but maintains "some leeway in making business decisions," including refusals to deal. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 862 (6th Cir. 1979) (*"Byars I"*), *appeal after remand* 1982-2 CCH Trade Cases ¶ 64,838 (6th Cir. July 14, 1982) (*"Byars II"*). *Accord, e.g., Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1388 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); *Six-Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958).[8] The Court below, however, without assailing the reasonableness of the Journal's judgment that advertising by rental referral agencies as a class threatened the Journal's integrity, nonetheless insisted that the Journal blind itself to experience and treat each such agency anew. This was an impermissible narrowing of Petitioner's range of legitimate business responses to the abuses characteristic of the rental referral industry.

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[8] The decision below relies on both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, the former provision involving the asserted "agreement" between the Journal and Home Placement's principal, Muschiano, one which the Court below equated with a combination which "fixed a maximum price of zero" (Slip op. at 8, App. A8.) This characterization is infected with the overly simplistic and overbroad "literalness" condemned by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979). Thus, even if Muschiano's "acquiescence" in the Journal's no-fee-to-prospective-tenants policy suffices to establish the requisite concert of action (*but see, U.S. Colgate & Co., supra*, 250 U.S. at 307; *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 289 (5th Cir. 1978) *cert. denied*, 440 U.S. 939 (1979)), the Journal's insistence that referral agencies not charge their fees, whatever the amount, to the prospective tenant in advance is not subject to *per se* condemnation. The rule-of-reason inquiry thus applicable does not significantly differ from the analysis under Section 2 addressed in the text. *See Byars v. Bluff City News Co., Inc., supra*, 609 F.2d at 860.

In short, a Writ of Certiorari should issue to correct the First Circuit's deviation from constitutional precepts established by this Court and to resolve the conflict among the circuits in resolving fundamental questions arising under the Sherman Act.

Reasons for Granting the Writ.

A. The Decision Below, in Disregard of First Amendment Principles Consistently Enunciated by this Court, Erroneously Imposed Antitrust Liability for a Publisher's Decision Concerning the Content of Its Newspaper.

It must be recognized that newspaper publishers are not simply engaged in an ordinary business operation, but participate in a process protected by the constitutional guarantee that "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. Const. Amend. I. This is not to say that the media are immune from antitrust scrutiny. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). Rather, where, as in the instant case, liability turns on content, the publisher operates within a larger zone of reasonableness and may take into account journalistic, as well as business, considerations.

The Court of Appeals in the earlier Homefinders case recognized that "... First Amendment rights in this case are not to be ignored ..." (621 F.2d at 443, App. A58.) That Court also stated that "... Even when it might lack proof of actual fraud, we would hesitate long before holding that a newspaper, monopoly or not, armed with both a First Amendment and a reasonable business justification, can be ordered to publish advertising against its will." *Id.* at 444, App. A60-A61. (Citations omitted).

The Court of Appeals in the instant case, however, made no accommodation for the strong First Amendment interests which are at stake when a publisher with proper motives and in good faith sets an advertising acceptability policy aimed at protecting the interests of the newspaper and of its readers. The Court of Appeals denigrates the good faith exercise of editorial judgment on the content of the newspaper, writing it off as an impermissible "paternal judgment." (Slip op. at 4, App. A4.) Such a narrow and confining approach is inconsistent with the precedents of this Court.

Although traditional First Amendment jurisprudence centers on what the press chooses to disseminate, a number of cases recognize the protection for what the press chooses to refrain from publishing. Nearly forty years ago, this Court was sensitive to the profound constitutional question which would be raised by an antitrust decree compelling newspaper publishers "to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). Thereafter, following a number of cases in which that issue implicitly passed on but not explicitly decided, this court held that such compulsion was unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In unanimously striking down a Florida statute giving political candidates a "right of reply," the Court held that:

> "...[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this cru-

> cial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 418 U.S. at 258 (footnote omitted).

The Court below, in essence, granted all who would claim to compete with the dominant newspaper in a community[9] the right of access, against the will of the publisher, to the pages of that newspaper. The logical implication of the Court's decision are disturbing. For example, one result of the Court of Appeals' holding is that a newspaper, owning a cable TV station which shows movies, could not, as a matter of editorial policy, refuse to publish the advertising of "X-rated" movies for theatre operators, who would be potential "competitors" of the newspaper and its cable TV division in the entertainment market even if the newspaper had no anticompetitive animus. *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972). If allowed to stand, the decision below reduces such newspapers to "passive receptacle[s] or conduit[s] for ... advertising,"—a result wholly at odds with the holding and rationale of *Tornillo*.[10]

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[9] The limitation of the ruling below to so-called "monopoly" newspapers is of no practical significance, for even a decade ago only 4 percent of our large cities had two or more independently operated daily newspapers. *See, Tornillo* at 249 n.13. *See, also, Times Picayune v. United States*, 345 U.S. 594, 603 (1953) (as of 1951 "81% of all daily newspaper cities, had only one daily newspaper; 11% had two or more publications, but a single publisher controlled both or all.")

[10] A number of post-*Tornillo* cases upholding a publisher's right to refuse advertising have been explicitly grounded, at least in part, on First Amendment principles. *See, Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976); *cert. denied*, 430 U.S. 982 (1977); *Allston v. Lewis*, 480 F. Supp. 328, 334 (D.S.C. 1979); *Person v. New York Post Corp.*, 427 F. Supp. 1297, 1301 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891, ____ (1979). *Cf., In re Coachlight Dinner Theatre, Inc.*, 8 Bankr. 657, 659 (Bankr. S.D.N.Y. 1981) (broadcaster's refusal).

In disregarding the First Amendment interests involved, the decision below conflicts with established case law resolving the potential tension between the First Amendment and the Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), and its progeny teach that activity which is prima facie protected by the First Amendment cannot be the predicate for antitrust liability absent a showing that the protected activity is a sham or pretext for direct economic and anti-competitive interference with a competitor. Indeed, at least one court of appeals has held that the prospect of treble damages, and of protracted and expensive antitrust litigation, poses such a threat to constitutional rights as to demand that the plaintiff meet an elevated standard of pleading and proof. *See, Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979) ("clear and convincing evidence" required to overcome presumption that litigation commenced in good faith), *cert. denied*, 444 U.S. 1025 (1980); *Franchise Realty, Etc. v. San Francisco Loc. Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976) (plaintiff must make "allegations of the specific activities" not constitutionally protected), *cert. denied*, 430 U.S. 940 (1977). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (First Amendment precludes liability without fault in actions based on content of publication).

The Journal's policy of refusing to publish advertisements carrying a high potential for deception—a policy based on past experience with a similar business and falling well within the range of journalistic reasonableness—was, under *Tornillo*, constitutionally protected. That being the case, the First Circuit's insistence that the Journal deal with rental referral agencies on an *ad hoc* basis was an intrusion into the constitutionally protected internal editorial process. Nothing in the antitrust laws authorized that intrusion because the Journal's articulated basis for the policy was, as the Court of Appeals itself recognized, not pretextual.

B. The Decision Below Erroneously Departed from the Construction Consistently Adopted by Other Courts of Appeals Construing the Sherman Act to Afford Even a Dominant Firm Reasonable Leeway in Customer Selection and Is Irreconcilably in Conflict with those Decisions.

Any analysis of refusals to deal under the Sherman Act must begin with this Court's classic statement in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919):

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

The court below apparently concluded that the Journal's possession of monopoly power in the market coupled with the "special circumstances" of Home Placement's status as a competitor in that market established the prohibited "purpose to create or maintain a monopoly."

The hypothetical possibility of "competition" between rental referral firms and the classified advertising function of a daily newspaper is conceded by the Journal for purposes of this appeal. However, it must be pointed out that the record goes no further than the bare characterization of rental referral firms as "in competition" with the Journal; the extent and significance, if any, of that competition in the real world is nowhere addressed. The record in this case is totally devoid of any evidence that could serve as a basis for showing anything more than a theoretical competitive relationship between the parties. Thus, in the absence of some evidence of anticompetitive intent and substantial anticompetitive effect, the Court of Appeals' conclusion is unsupportable in the balancing of First Amendment rights and antitrust principles under the facts of this case.

The Journal's unsatisfactory experiences with Homefinders were deemed insufficient by the Court of Appeals as a predicate for the Journal's across-the-board policy of declining to print rental referral advertising. As a result, the Court of Appeals imposed on the Journal an affirmative duty to deal with competitors by accepting advertising which in its editorial judgment it had deemed to be unacceptable. In doing so, the Court unduly restricted the zone of business reasonableness which other federal courts of appeals have consistently afforded even to those in possession of monopoly power.

The conflict among the circuits is best illustrated by contrasting the decision below with that of the Fifth Circuit in *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1980). The court there set aside a jury verdict for an independent local telephone service company ("WTC") which was refused interconnection with the existing Bell System interstate network—interconnection "essential" to the local company's ability to do business. *Id.* at 1375-1376. Bell, which wished to provide local service in the same area, based its refusal on the ground that service would constitute a wasteful duplication of facilities, not in the public interest. *Id.* at 1376-1377. After an exhaustive review of the pertinent cases, *id.* at 1387-1389, the Fifth Circuit held that the district court had erroneously taken from the jury any consideration of the public interest justifications offered by Bell. *Id.* at 1389. The appellate court was quite explicit in its mandate that the trier of fact consider all relevant factors:

> Bell's position is that the refusal was not arbitrary or motivated by anticompetitive intent, but instead was proper because Bell believed that WTC's request was contrary to the public interest. If Bell was correct in its assessment, and if its purpose in refusing interconnection was to vindicate the public interest, then the refus-

> al, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny. In this case, where the public interest has not been officially determined, it is no less important for the vindication of the statutory procedure that under proper instruction the jury be allowed to consider why Bell's refusal to interconnect was reasonable under the antitrust laws because it was based on articulable concerns of regulatory policy. The important issue in this case is whether Bell's action was reasonable under antitrust law in light of the relevant factors concerning the public interest standard. *Id.* at 1390 (footnote omitted).

The court below, however, simply brushed aside the Journal's good faith "articulable concerns" about its readers and about its journalistic integrity, insisting instead that the Journal approach the question of rental referral advertising on an *ad hoc* basis.

Mid-Texas Communications, supra, is not an anomaly in antitrust jurisprudence. Quite to the contrary, the decision below is anomalous. Federal appellate courts have considered refusals by the sole VHF television station in a market to accept advertising produced by competitors. *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958). In each case, the central inquiry was the reasonableness of the refusal from a business standpoint. *See, Six-Twenty-Nine, supra,* 365 F.2d at 486 ("Standards for agency recognition go to the heart of the alleged Section 2 violation. The question of their reasonableness is the key factor in determining whether the Station had the intention of eliminating the competition of the plaintiff agency.") (footnote omitted); *Packaged Programs, supra,* 255 F.2d at 710 ("The only controversy . . . is

whether Westinghouse has exercised judgment in bona fide determination whether programs are meritorious and in the public interest, or has used its power of selection among available programs arbitrarily as an instrumentality for eliminating a competitor in program production.")

The judgment below was neither compelled nor supported by this Court's decision in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), wherein the publisher of the dominant newspaper had responded to the establishment of a competing radio station through a course of "bold, relentless, and predatory commercial behavior," refusing to sell advertising space to those local merchants who patronized its fledgling competitor. *Id.* at 148-149. Central to the Court's holding of antitrust liability in that case was the manifestly anticompetitive motive of the publisher there, untempered by any colorable business justification. *Id.* at 155. *Accord, United States v. Kansas City Star Co.*, 240 F.2d 643, 662 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957). The record in the instant case is precisely to the contrary, amply supporting the trial court's finding that the Journal's "refusal was a reasonable business decision," made in an effort "to minimize the chance it would run afoul of the law or harm its reputation." (Slip op. at 7-8, App. A7-A8.) Whatever the theoretical validity of the "competition" between the Journal and rental referral agencies for the trade of landlords, the record is devoid of evidence that such "competition" was of any practical significance or played even the slightest part in the Journal's adoption of the policy in question.

The Journal regarded the abundant record evidence of deception and sharp practices by Homefinders, coupled with the nature of the rental referral business, as having established beyond peradventure the reasonableness of that policy.[11] However, given the misperception below, a brief ex-

[11] The potential and incentive for abuse and deception is rooted in the advance fee aspect of the rental referral business, leading a

planation is appropriate. This Court has never insisted that the government is obliged to address deceptive advertising exclusively on an individualized basis. Advertising of a character which "experience has proven subject to abuse" may be prohibited across-the-board. *In re R. M. J.*, ____ U.S. ____, 102 S.Ct. 929, 937 (1982). Thus, attorneys may be barred from in-person solicitation, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978) (prophylactic rule appropriately founded on "potential for over-reaching") and optometrists may be prohibited from practicing under trade names, *Friedman v. Rogers*, 440 U.S. 1, 12 (1979) (noting the "significant possibility that trade names will be used to mislead the public" and the numerous "possibilities for abuse"). Indeed, at least one court has sustained adminis-

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number of jurisdictions to limit or prohibit this practice. *See, e.g., In re N.J.A.C. 11: 5-1.32—Rental Location Operations*, 179 N.J. Super. 294, 431 A.2d 855, 857 (App. Div. 1981) (advance fees limited by administrative agency in response to "documented abuses within the real estate industry"); *Homes Unlimited, Inc. v. City of Seattle*, 90 Wash.2d 154, 579 P.2d 1331, 1335 (1978) (advance fees practice banned by ordinance viewed as "important factor which encouraged the negligent and indifferent rendering of promised services"). Moreover, even if respondents refrained from the crude forms of deception practiced by Walker, their advertisements for specific properties for rent were inherently deceptive. *See, e.g., Sacramento Data Processing, Publication & Sales v. Department of Consumer Affairs*, 129 Cal. App.3d 348, 181 Cal. Rptr. 51, 55 (1982) (advertisement of specific job openings by employment referral agency misleading). It is undisputed that rental referral agencies derive no revenues from the rentals of the advertised property, instead generating income through the sale of information pertaining to rental properties available from third-party landlords. The immutable fact remains that the specific properties advertised by respondents, however truthful their description in the advertisement, could not be rented from Home Placement. Of necessity, those who rose to the "bait" by answering the advertisement were "switched" by respondents to the entirely different product which they had for sale. This is classic bait-and-switch advertising. *See*, 16 C.F.R. § 238.0.

trative regulations totally prohibiting rental referral agencies from advertising specific properties. *Galaxy Rental Service, Inc. v. State*, 108 Misc.2d 237, 437 N.Y.S.2d 854, 860 (1981) (advertising by rental referral agencies found to have "demonstrated potential for fraud and deception"). Perforce, the Journal, as a private enterprise, should not be required to have ironclad proof of deception as the predicate for deciding not to publish a category of advertising that it considers unacceptable.

The Journal articulated a basis for the advertising acceptability policy at issue—preservation of its own integrity—which was neither "facially implausible" (*Mid-Texas Communications, supra*, 615 F.2d at 1390) nor facially anticompetitive. The Court of Appeals, without overturning the trial court's finding that the articulated basis was not pretextual, substituted its own notions of reasonableness.

The Court of Appeals did so without setting aside the District Court's specific findings that the Journal's advertising acceptability policy was made in good faith and for reasons unrelated to competition (Slip op. at 7-8, App. A7-A8.) Virtually identical District Court findings were, in fact, upheld by the Court of Appeals in the related Homefinders litigation. (621 F.2d at 443, App. A58.)

The rationale of the Court of Appeals' decision limiting a newspaper's right to determine the acceptability of advertising brings it into conflict with decisions of other circuits. This conflict should be resolved by this Court.

C. The First Circuit's Independent Determination of the Reasonableness of Petitioner's Advertising Policy Was a Clear Departure from the Established Standards of Appellate Review in the Federal Judicial System.

The Court of Appeals did not and could not fault the District Court's inquiry into the genesis of the Journal's policy to

decline advertising placed by rental referral agencies which charged prospects a fee to obtain rental information. That inquiry, which considered the testimony and other evidence adduced in the related *Homefinder's* litigation, as well as further proofs pertaining to respondent's operations, was resolved in petitioner's favor, the trial court finding that the policy had been adopted in good faith for sound business reasons, *i.e.*, the protection of the Journal's editorial integrity. (Slip op. at pp. 7-8, App. A7-A8). In rejecting those findings, the Court of Appeals deviated from the standard of appellate review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure, as recently applied by this Court in *Pullman-Standard v. Swint*, ____ U.S. ____, 102 S.Ct. 1781 (1982).

The decisions of other circuits cited in the preceding section make it abundantly clear that the resolution of the reasonableness question in a refusal to deal case is for the fact finder. *See, Mid-Texas Communications, supra*, 615 F.2d at 1390; *Byars I, supra*, 609 F.2d at 864; *Six Twenty-Nine Productions, supra*, 365 F.2d at 486; *Packaged Programs, supra*, 255 F.2d at 710. Thus, if one reads the decision below as *sub silentio* applying the legal analysis articulated in those decisions but setting aside the trial court's findings that the Journal acted reasonably, it is clear that the First Circuit fundamentally misconceived the proper role of an appellate court in the federal judicial system. Rule 52(a) of the Federal Rules of Civil Procedure explicitly demands appellate deference to findings of fact in non-jury trials, admonishing that such findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court of the credibility of the witness."[12]

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[12] The First Circuit did state that it "must label as clearly erroneous the [trial] court's finding that plaintiff's new evidence 'is a distinction in search of a difference . . . The respective schemes of Homefinders are, for purposes of this proceeding, indistinguish-

It must be remembered that the record below established petitioner's adoption of its policy in response to the deceptive practices of Walker's rental referral agency and the perceived potential for abuse by any such agency. The Court of Appeals, substituting its own view for that of the trial judge, found the potential for abuse insufficient to support the broad prophylactic rule. In short, the appellate tribunal decided the central factual issue anew. Rule 52(a) required the Court below to affirm, notwithstanding its possible belief that "[t]here is little doubt that [the panel] may well have come to a different conclusion had it viewed *de novo* the evidence on the present record." *See, Byars II, supra*, 1982-2 Trade Cases at p. 72, 159.

The decision below cannot be sustained on the theory that the reasonableness of the Journal's conduct is an "ultimate" fact which an appellate court is free to determine independently, as distinguished from a "subsidiary" fact which stands unless clearly erroneous. Such a distinction, this Court recently held, is wholly without support in the letter or spirit of Rule 52(a). *See, Pullman-Standard, supra*, 102 S.Ct. at 1789. Nor was the Court of Appeals free to make findings which the trial court omitted due to a supposedly erroneous view of the law; the appropriate course in that event would be "a remand for further proceedings to permit the trial court to make the missing findings." *Id.* at 1791.

The Court below disregarded Rule 52(a)'s admonition that a district court's findings of fact, duly made after a bench

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able.' Rather, there were marked differences, requiring, as a matter of law, a different result." (Slip op. at p. 2, App. A2.) Petitioner views this passage, despite the incantation of the phrase "clearly erroneous," to reflect the appellate court's disagreement as to the appropriate legal analysis, rather than its rejection of the trial court's findings of fact. There is no suggestion in the remainder of the opinion below that the trial court was mistaken in his understanding of how either respondents or Walker had operated.

trial, are not to be set aside unless clearly erroneous. A Writ of Certiorari should accordingly issue to correct the First Circuit's departure from the accepted and usual course of appellate review.

Conclusion.

Newspaper publishing companies across the nation continually exercise their reasoned discretion in selecting material appropriate for their readership and consistent with journalistic integrity and image. The sheer volume and regularity of those activities underscore their importance. Prior to the decision below, other courts of appeals had consistently applied the Sherman Act so as not to foreclose even a dominant firm, whether or not a mass media outlet, from exercising reasonable business judgments in choosing those with whom it would deal. The decision below—inconsistent with decisions of other courts of appeals—injects confusion and uncertainty into this sensitive area. The Court below, compounding its departure from settled antitrust principles, intruded into an area which, this Court has held, the First Amendment reserves to the publisher's exercise of reasonable journalistic judgment. Accordingly, a Writ of Certiorari should issue to resolve this significant question arising under federal antitrust law and to correct the First Circuit's deviation from core constitutional principles.

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